

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ALFREDO ROJAS-MARTINEZ,

Defendant.

4:14-CR-3123

ORDER

This matter is before the Court on the defendant's "Motion Asking the Honorable Court to Compel Defense Counsel to Release All Documents Pertaining to Petitioner's Case" (filing [33](#)). The defendant asks the Court to compel his defense counsel to provide him with copies of his sentencing transcripts, claiming that he may be entitled to a "sentence recalculation" because of changes to his criminal history affected by "Proposition 47," a California ballot initiative that reclassified certain former felonies into misdemeanors. He contends that he needs his sentencing transcript to prepare such a request.

But because no appeal was filed in this case, no transcript of the sentencing was prepared. A member of the Nebraska bar is ethically required to protect a client's interests, including the surrender of papers and property to which the client is entitled. *See* [Neb. Ct. R. of Prof. Cond. § 3-501.16\(d\)](#). But counsel cannot surrender to the defendant what he does not have, and the Court has no other reason to believe that counsel has not complied with [§ 3-501.16\(d\)](#) in all other respects.

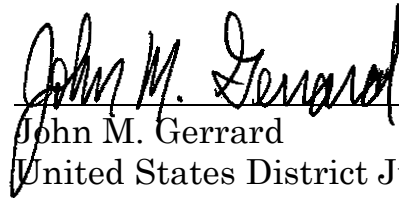
An indigent defendant bringing a postconviction proceeding under [28 U.S.C. § 2255](#) may have a transcript prepared at the government's expense, if the suit is not frivolous and the transcript is needed to decide the issue presented by the suit. [28 U.S.C. § 753](#). But any request for a free transcript prior to the filing of a [§ 2255](#) motion is premature. *Chapman v. United States*, [55 F.3d 390, 390-91 \(8th Cir. 1995\)](#). And the defendant has not filed such a motion yet in this case. Nor does the defendant have the right to receive copies of documents without payment, even if he has leave to proceed in forma pauperis. *See*, [28 U.S.C. § 1915](#); *Lewis v. Precision Optics, Inc.*, [612 F.2d 1074, 1075 \(8th Cir. 1980\)](#). The defendant may, if he files a [§ 2255](#) motion, move for a transcript to be prepared pursuant to [§ 753](#), and the Court

would at that time consider whether his motion is frivolous and the transcript is necessary.<sup>1</sup>

IT IS ORDERED that the defendant's motion to compel (filing 33) is denied.

Dated this 22nd day of December, 2015.

BY THE COURT:

  
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John M. Gerrard  
United States District Judge

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<sup>1</sup> The Court notes, for the defendant's information, that it is unlikely Proposition 47 will provide any relief from a federal sentence. A defendant serving a *California* sentence may petition for a resentencing from the California sentencing court. See [Cal. Penal Code § 1170.18](#). But for a *federal* sentence, criminal history points are primarily assessed based on the actual state sentence of imprisonment, not the state-law classification of the crime. See [U.S.S.G. 4A1.1](#). And whether a defendant would receive a lesser sentence in state court if convicted now does nothing to change a state sentence that was already served. See [United States v. Bakhchadjian](#), No. CR 11-72, 2015 WL 6697231, at \*2 (C.D. Cal. Nov. 3, 2015).